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**Before the
Federal Communications Commission
Washington, D.C. 205554**

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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

In the Matter of)
)
Implementation of Section 309(j) and)
337 of the Communications Act of 1934) **DOCKET FILE COPY ORIGINAL**
As Amended)
)
Promotion of Spectrum Efficient) WT Docket No. 99-87
Technologies on Certain Part 90)
Frequencies)
)
Establishment of Public Service Radio)
Pool in the Private Mobile Frequencies)
Below 800 MHz)

To: The Commission

**REPLY OF APCO TO OPPOSITION TO
PETITION FOR PARTIAL RECONSIDERATION**

The Association of Public-Safety Communications Officials-International, Inc. ("APCO") hereby replies to the United Telecom Council ("UTC") and the Association of American Railroads ("AAR") which have opposed APCO's Petition for Partial Reconsideration of the Commission's *Report and Order* in the above-captioned proceeding, FCC 00-403, released November 20, 2000.

APCO's Petition argues that the Commission misinterpreted Section 337(c)(1)(A) of the Communications Act of 1934, as amended, when it made the following statement in the *Report and Order*:

We believe that the statutory language is clear in that it expressly requires that no other spectrum allocated to public safety service be available without any qualification. Thus, we believe that the statute requires that there be no unassigned public safety spectrum, or not enough for the proposed public safety use, in any band in the geographic area in which the Section 337 applicant seeks to provide public safety services.¹

¹ *Report and Order* at ¶132.

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As discussed in the Petition, the Commission's interpretation ignores the plain language of Section 337(c)(1)(A), which imposes a condition that "no other spectrum allocated to public safety services is immediately available *to satisfy the requested public safety service use.*" The highlighted phrase requires that the Commission consider not only whether spectrum allocated for public safety is available, but also whether such otherwise available spectrum is appropriate "to satisfy the requested public safety use."

AAR and UTC suggest that the Commission was correct in ignoring that phrase, pointing as support to the extremely slim legislative history of the provision, which merely parrots the statute, but without the phrase: "to satisfy the requested public safety service use." That, they argue, suggests that Congress did not intend to give meaning to the excluded phrase. However, it is not the legislative history that controls, it is the plain language of the statute. If Congress had not intended for the phrase to have meaning, then why is it in the statute at all? Once again, APCO notes the basic rule of statutory construction that "effect must be given, if possible, to every word, clause and sentence of a statute" and that a "statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous."²

APCO is not suggesting, however, that an applicant should receive a statutory waiver merely upon a showing that there is no vacant public safety spectrum in its "preferred band." Waiver applicants must also demonstrate that spectrum is not available in other public safety bands *or*, if spectrum appears to be available in other bands, that such otherwise available spectrum will not satisfy the proposed public safety use. As described in the Petition for Reconsideration, factors for such consideration might include the technical feasibility of

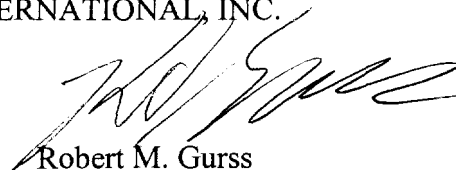
² Sutherland Stat. Const. §46.06 (5th Ed) (quoting *State v. Bartley*, 39 Neb 353, 58 NW 172 (1894)).

alternative public safety bands or the impact on interoperability. However, contrary to its conclusion in the *Report and Order*, the Commission cannot summarily dismiss a Section 337(c) waiver request on the sole basis that public safety frequencies are available somewhere else in the radio spectrum. Rather, the plain language of the statute requires the Commission to consider claims that such otherwise available public safety spectrum is simply not a reasonable alternative and, therefore not “immediately available to satisfy the requested public safety use.” Any other interpretation violates the express Congressional intent that the FCC waive its rules where necessary to ensure that public safety users have access to the spectrum they need to protect the safety of life, health, and property.

Respectfully submitted,

ASSOCIATION OF PUBLIC-SAFETY
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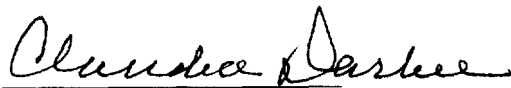
March 19, 2001

CERTIFICATE OF SERVICE

I, Claudia Darbie, hereby certify that copies of the foregoing "Reply of APCO to Opposition for Partial Reconsideration" were served this 19th day of March 2001, via first-class mail, postage-prepaid, to the following individuals at the address listed below:

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